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August 9, 1994

**VIA HAND DELIVERY**

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20036

**Re: GN Docket No. 93-252**
**Second Further Notice of Proposed Rulemaking**
**Comments of the American Mobile**
**Telecommunications Association, Inc.**

Dear Mr. Caton:

On behalf of the American Mobile Telecommunications Association, Inc., enclosed herewith please find its Comments in the above-referenced proceeding.

Kindly refer any questions or correspondence to the undersigned.

Very truly yours,

Elizabeth R. Sachs

ERS:cls

Enclosure

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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**



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| In the Matter of | ) | |
| | ) | |
| **Implementation of Sections 3(n) and 332 of the Communications Act** | ) | GN Docket No. 93-252 |
| | ) | |
| | ) | |
| Regulatory Treatment of Mobile Services | ) | |
| | ) | |

To: The Commission

**COMMENTS ON THE**
**SECOND FURTHER NOTICE OF PROPOSED RULEMAKING**

Respectfully submitted,

**AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, INC.**

By: _____
Elizabeth R. Sachs
Its Attorney

**Lukas, McGowan, Nace & Gutierrez**
1819 H Street, N.W., Suite 700
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August 9, 1994

Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | GN Docket No. 93-252 |
| **Implementation of Sections 3(n) and 332 of the Communications Act** | ) | |
| Regulatory Treatment of Mobile Services | ) | |

## COMMENTS ON THE SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

The American Mobile Telecommunications Association, Inc. ("AMTA" or "Association"), by its attorneys, and in accordance with Section 1.415 of the Federal Communications Commission ("FCC" or "Commission") Rules and Regulations, respectfully submit the following Comments in the above-entitled proceeding.[1/] The instant Notice requests comment on whether the Commission should consider certain non-equity relationships to be attributable interests for purposes of applying the 40 MHz limitation on PCS spectrum, the PCS-cellular cross-ownership rules, or a more general Commercial Mobile Radio Service ("CMRS") spectrum cap. Order § 4. Specifically, the FCC questions whether system management, resale and joint marketing agreements so intertwine the parties involved that competitive levels might be adversely affected.

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[1/] Second Further Notice of Proposed Rule Making, GN Docket No. 93-252 (released July 20, 1994) ("2nd FNPR" or "Notice").

The Notice also queries whether a more permissive approach should be adopted when the licensee is a so-called designated entity.

For the reasons described below, AMTA recommends that the FCC not expand its definition of attributable interests for spectrum cap calculations to include non-equity interests of any sort. The Association has already explained why it opposes the adoption of an across-the-board CMRS spectrum cap as proposed in an earlier phase of this proceeding.[2/] Should the Commission nonetheless adopt such a limitation, its determinations as to what constitutes an attributable interest should be sufficiently narrow so as to enhance, not impede, competition in that marketplace.

## I. INTRODUCTION

AMTA is a nationwide, non-profit trade association dedicated to the interests of what heretofore had been classified as the private carrier industry. The Association's members include trunked and conventional 800 MHz and 900 MHz SMR operators, licensees of wide-area SMR systems, and commercial licensees in the 220 MHz band. These members provide commercial wireless services throughout the country, and represent the substantial majority of those private carriers whose systems have been reclassified as CMRS.

As the Commission is aware, management agreements have been an integral, positive factor in the successful maturation of both the 800 MHz and 900 MHz SMR

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[2/] See AMTA Comments and Reply Comments on the Further Notice of Proposed Rule Making, GN Docket No. 93-252, FCC 94-100 (released May 20, 1994), filed June 20, 1994 and July 11, 1994 respectively ("FNPR").

industries. The same is likely to be true in the 220 MHz band. Because the development of these services has been enhanced overall by the ability of licensees to secure desirable management arrangements, subject to applicable FCC rules and policies, the Association has a substantial interest in the FCC's proposal to consider such arrangements as attributable interests for spectrum cap purposes.

## II. DISCUSSION

### A. THE FCC SHOULD NOT ADOPT A CMRS SPECTRUM CAP

At the outset, AMTA wishes to reaffirm its opposition to the adoption of a CMRS spectrum cap, irrespective of the particular attribution rules adopted. The Association has previously described in detail the paucity of record evidence supporting the need for such a cap to promote robust competition. The Commission's proposal was opposed by virtually every segment of the CMRS industry, including cellular and PCS interests which might have been expected to endorse expansion of the cap to include all CMRS services, not just their own. AMTA urges the Commission to consider carefully the virtually unanimous position adopted by the CMRS industry on this matter of substantial significance.

### B. NON-EQUITY INTERESTS SHOULD NOT BE ATTRIBUTABLE UNDER ANY CMRS SPECTRUM CAP ADOPTED

However, if the FCC determines to adopt such a cap, despite the record in this proceeding, the Association recommends against further expanding its potentially adverse

impact by including even non-equity interests as attributable.[3/] AMTA disagrees that interests such as management, resale and joint marketing agreements are likely to affect the incentive or ability of licensees to compete vigorously in the marketplace or compromise the independence of pricing decisions by ostensibly competitive service providers Order § 5. To the extent that the licensees in any equity or non-equity relationship conspire or collude to set prices, the government is already empowered to bring to a halt such anti-competitive behavior. The FCC, the Department of Justice and other federal agencies are well equipped to handle such matters when and if they do arise. The approach being considered by the FCC, by contrast, would adopt prophylactic measures which may be unnecessary and which could have the inadvertent effect of diminishing competition, particularly by those parties which would qualify as designated entities.

The objective in the instant proceeding is to establish the proper balance between enhancing competition and facilitating the participation in the burgeoning wireless marketplace of a diverse array of service providers. The Notice notes specifically that the types of arrangements under consideration are permissible under current FCC rule and policy. Notice § 5. The Communications Act and the FCC's rules prohibit any arrangement which confers on a party other than the licensee de facto control of an FCC-

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[3/] The Association also iterates its recommendation that, should a CMRS spectrum cap be adopted, the attribution level should be increased from the proposed five (5) to forty (40) percent, unless a party is determined to have actual control at some lower level.

authorized facility, even if de jure ownership remains with the licensee.[4/] In fact, the Commission has identified a number of factors to be analyzed in determining whether a licensee has impermissibly relinquished control of and responsibility for its authorized facility. These criteria were first articulated in an early Commission decision regarding a purported unauthorized transfer of control.[5/] Consistent Commission analyses have been developed for both the cellular and SMR industries.[6/]

Thus, the arrangements at issue are those which have been found already by the FCC to comport with its requirements regarding real-party-in-interest considerations. They are permissible because they do not transfer to the non-licensee improper control over policy, financial, or operational aspects of system management. For this same reason, AMTA believes that such interests should not be considered attributable.

The Commission queries whether the arrangements at issue provide the manager with access to information which might be used to subvert competition, or whether they permit an intermingling of business interests to such a degree that consumer choices are diminished. Notice § 6. The agency is also concerned that management or similar arrangements would permit the use of front organizations to take advantage of designated entity opportunities. Id.

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[4/] See Notice at FN 7.

[5/] Intermountain Microwave, 24 RR 983 (1963) ("Intermountain").

[6/] See generally Public Notice, Common Carrier Public Mobile Services Information, "Mobile Services Division Releases Guidance Regarding Questions of Real Party in Interest and Transfers of Control for Cellular Applications," Report No. CL-93-141, Sept. 22, 1993; Public Notice, "Private Radio Bureau Reminds Licensees of Guidelines Concerning Operation of SMR Stations Under Management Contracts", 64 RR 2d 840 (March 3, 1988).

The Association finds the FCC's concerns misplaced in those respects. Competition is enhanced when a variety of service providers are making independent decisions regarding their marketing and pricing strategies. If the relationship between the parties is such that the licensee is not able to exercise its own independent judgment regarding such matters, then it is likely the Commission would find that it had relinquished control of the system. By contrast, a licensee which remains in control would not be likely to maintain an arrangement in which its market sensitive information was being used by another party to that party's advantage. The same is true of the potential "integration" of the businesses of multiple parties. Notice § 6. If the relationship is such that their activities become indistinguishable, then they most likely have exceeded the FCC's boundaries of permissible relationships.

It is AMTA's experience that the availability of permissible management agreements can increase the number of service providers in a marketplace rather than act as an impediment to vigorous competition. That has been true in the 800 MHz and 900 MHz SMR industries, and is expected to be the case in the commercial 220 MHz market as well. The relative prevalence of management arrangements in these bands is directly reflective of the rules which govern them. The regulatory structures for these services were intended to maximize the number of competitive offerings in a market by assigning spectrum in very small blocks of frequencies and establishing stringent construction and loading requirements to be satisfied prior to system expansion.

This regulatory environment enabled a large number of entities to participate in these industries. Some were very large companies with substantial resources and

expertise. Others were relatively small operators who utilized management arrangements to supplement their own technical and marketing capabilities when necessary. In certain instances, licensees managed their own systems when they were geographically proximate, but entered into management relationships for facilities farther away. Some operators relied on management arrangements for their initial systems, but found them unnecessary for later-acquired facilities after they had developed sufficient expertise. The Association expects a similar pattern to emerge in the commercial 220 MHz service.

Thus, in AMTA's opinion, this business tool has facilitated the participation of a significant number of smaller entities in the private carrier industry to their benefit and the benefit of the public which used their services. This would not have occurred if the Commission had treated such arrangements as cognizable interests in multiple systems. Prospective system managers undoubtedly would have declined to provide these services, which legally could not confer de facto system control and which entailed only non-equity participation, if doing so restricted their ability to own and operate their own systems. It is not clear to what extent this would have precluded smaller entities from providing these services, but the effect would certainly have been to promote system ownership by larger, more experienced and better capitalized companies.

The same would be true if system management, even when in full conformance with applicable Commission requirements, were to constitute an attributable interest for purposes of a CMRS spectrum cap. Those capable of providing management services would be deterred from doing so, and smaller parties, particularly designated entities, could encounter substantial difficulty in fulfilling all functions needed to operate such

systems. Moreover, the Association sees no logical or legal rationale for adopting different provisions for designated entities should the FCC determine that such relationships should be considered attributable interests. If the Commission is persuaded that these arrangements compromise the development of a healthy competitive environment, that determination must override any desire the agency might have to promote the individual business interests of any particular competitor or class of competitors. In fact, it could be argued that designated entities may be more susceptible to the types of practices about which the Notice expresses concern since they are likely, on balance, to be less experienced in the wireless communications business, and perhaps in any business enterprise. Although AMTA appreciates that the Commission does not intend this proposal to inhibit the ability of designated entities to participate in the CMRS marketplace, adoption of this restriction would unquestionably have a chilling effect on their opportunities. That result is clearly not intended by the Commission, and is not in the public interest.

### C. FCC REVIEW OF MANAGEMENT AGREEMENTS WOULD UNNECESSARILY BURDEN THE AGENCY'S LIMITED RESOURCES

As described above, the Association does not believe that classifying non-equity interests as attributable for purposes of a CMRS spectrum cap is necessary to promote a vigorously competitive wireless service marketplace, or otherwise to serve the public interest. The Commission has also queried what administrative resources would be required to review management agreements to determine if they have adequate safeguards to insulate against any anti-competitive effects. Notice § 8. Thus, it appears that the

FCC would consider permitting such arrangements without attribution, at least under certain circumstances.

AMTA submits that the type of review contemplated by the FCC would be extraordinarily burdensome and without commensurate benefit. There is a variety of management and other non-equity agreements used in the communications industry which include widely differing provisions dependent on the scope of services provided and even on the type of system being managed. For example, there simply is not as much involved in the day-to-day management of a five channel SMR system as there is in running a cellular operation. They differ both in the actual activities that must be managed and in the personnel and other resources required to carry them out. In either case, however, licensees and system managers each typically develop an agreement structure with which they are comfortable, and then negotiate aggressively to determine whose provisions prevail on which aspects of the arrangement. The intensity and variety of these individual negotiations will undoubtedly increase if the instant proposal is adopted since those parties still willing to engage in system management will be concerned about passing the FCC's non-attribution test. To the extent the FCC determines that a particular agreement constitutes an attributable interest, the agency will become embroiled in an analysis of myriad contractual matters which it has deferred to state interpretation in the past. That this activity will be time-consuming and burdensome to the Commission's staff is unquestionable; that it will not enhance the competitive levels of the CMRS marketplace is also evident.

### D. RESALE AND JOINT MARKETING AGREEMENTS SHOULD NOT BE ATTRIBUTABLE

The FCC has already tentatively determined that resale agreements do not raise competitive issues comparable to those the agency associates with system management. Notice § 13. AMTA agrees that resale should be freely permitted. Resale arrangements increase the number of parties offering service in a marketplace without allowing the additional parties any rights which could lead to an unauthorized transfer of control.

The Association also recommends that joint marketing agreements not be considered attributable. The Commission has already recognized that the economic advantages of such arrangements may be beneficial to both the licensees and their subscribers. Notice § 14. Again, however, the FCC questions whether this type of relationship could include practices which also discourage robust competition which would be detrimental to these same consumers. For the reasons described above in relation to management agreements, AMTA believes that the benefits likely to result from these arrangements outweigh any likely anti-competitive concerns. It recommends, therefore, that joint marketing agreements also be excluded from any CMRS spectrum cap calculations.

## III. CONCLUSION

For the reasons described, AMTA urges the Commission to proceed expeditiously to complete this phase of its transitional proceeding, consistent with the recommendations detailed herein.

## CERTIFICATE OF SERVICE

I, Cheri Skewis, a secretary in the law office of Lukas, McGowan, Nace & Gutierrez, hereby certify that I have, on this 9th day of August, 1994, placed in the United States mail, first-class postage pre-paid, a copy of the foregoing Comments on the Second Further Notice of Proposed Rulemaking to the following:

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Federal Communications Commission
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Federal Communications Commission
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* Commissioner Andrew C. Barrett
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* Commissioner Rachelle B. Chong
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